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NOV 19 2003

No. 03-541

In the

Supreme Court of the United States

TRENDI SPORTSWEAR, INC.,

Petitioner,

v.

BANK OF INDIA, INDU CRAFT, INC.,
The BANK OF BARODA,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

REPLY BRIEF

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PRELIMINARY STATEMENT

We identified three important issues warranting review by this Court. As discussed below, Baroda fails to address the nub of any of them.

ARGUMENT

1. The Impermissible Collateral Attack on a Confirmed Reorganization Plan Was an Extreme Departure from Well-settled Practice Warranting Review

Baroda and the lower courts simply ignore[1] the Bankruptcy Court's findings, TP[2], 8-23, and its underlying obligation to determine the validity of claims. Indisputably, the entire reorganization plan duly confirmed by the Bankruptcy Court stands unraveled by the Decisions. This departure from well-established law and practice is an issue of tremendous public importance today,[3] given giant bankruptcies such as K-Mart, UAL,

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[1]Baroda focuses on Indu Craft's disclosures concerning an earlier proposed reorganization plan (which plan Trendi never agreed to, and which plan was never approved by the Court). That proposal was modified to meet Trendi's insistence that its claims against Indu Craft, and prosecution of the claims herein against Baroda, be expressly provided for. Upon this being stipulated to, Trendi conditionally accepted the plan subject to approval of the Bankruptcy Court and its inclusion in the modified reorganization plan.

[2]"TP" refers to Trendi's "Petition for a Writ of Certiorari" of October 6, 2003; and "BR" refers to Baroda's undated "Brief in Opposition."

[3]Baroda's reliance on 80 year old cases for standards governing this petition, BR, 10, is misplaced given the codification in Rule 10, S.Ct. Rules.

and Conseco, and the continuing increase in bankruptcy filings.[4] Creditors ***must*** be able to rely upon the integrity of confirmed reorganization plans; the prospect of such plans being reopened in proceedings where they cannot even participate is too serious a systemic threat to ignore.

Baroda says nothing about the fact that (a) continued prosecution of Indu Craft's claims against Baroda were pivotal to that plan, TP, 8-10; (b) the lower courts could not selectively nullify portions of the plan, TP, 11-14; c) the Decisions negated factual findings of the Bankruptcy Court, TP, 14-17; and (d) any apparent conflict between the Bankruptcy Judgment and the plan had to be resolved by the Bankruptcy Court in the first instance, TP,18-22. Nevertheless, Baroda claims that the Decisions were "garden variety common law principles," BR, 1. But that does not prevent it from being a collateral attack: If these "principles" absolved Indu Craft of all liability, the Bankruptcy Court was duty bound to disallow Trendi's claim. Lesser v. Gray, 236 U.S. 70, 74 (1915) ("When an alleged debt or obligation is ascertained to be invalid -- without lawful existence -- the claim based thereon is ***necessarily disallowed***," emphasis added); Pepper v. Litton, 308 U.S. 295, 305 (1939) (same). Instead, that Court allowed Trendi's claim, quantified it and entered judgment thereon, necessarily finding that Indu Craft had ***not*** been absolved. In re Galletti, 298 F.3d 1107, 1110 (9th Cir. 2002).

Baroda scrupulously avoids addressing this critical issue: Why, if the Plan discharged Indu Craft of its liability to Trendi, did the Bankruptcy Court go to such

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[4] 13 of the 20 largest bankruptcies since 1980 were filed in the last two years. BankruptcyData.com. Bankruptcy filings increased by 40.96% from first quarter of 2000 to 2nd quarter of 2003. TP, 18 n.5.

great lengths in calling for and reviewing submissions, determining the damages, and entering judgment against Indu Craft on that liability 10 months after the Plan?

So also, Baroda repeats the District Court's sophistic reasoning that the Bankruptcy Judgment was valid as against Trendi but unenforceable against Indu Craft. But it offers neither precedent nor principle in support of such a schizophrenic judgment, TP, 22-23, an unheard-of concept in the law which is productive of great mischief.

Baroda blithely asserts that the Bankruptcy Court's judgment in favor of Trendi was a "collusive judgment", BR, 7 n.6.[5] However, Baroda advisedly does ***not*** impugn its validity.[6] As this Court held in Dickerman v. Northern Trust Co., 176 U.S. 181, 189-90 (1900),

> We have no doubt that this judgment was collusive in the sense that it was obtained by the plaintiff and consented to by the defendant company for the purpose of

---

[5]Baroda misleadingly points out that the Bankruptcy Court was "very, very nervous" due to perceived "insider problems". BP, 3 n.3. But the Bankruptcy Court's concern was expressed in connection with the then-proposed reorganization which that Court never approved. Baroda ignores that having expressed such strong reservations, obviously, the Bankruptcy Court would have necessarily reviewed with extraordinary meticulousness the reorganization plan which it did approve.

[6]Baroda continually refers to Trendi and Indu Craft misleadingly as "sister" corporations, although their affiliation ceased long ago and Indu Craft's sole shareholder has been a Hong Kong corporation called Tze Wung Consultants. Bank of India v. Trendi Sportswear, Inc., 2002 U.S. Dist. LEXIS 894, at *2 n.1 (S.D.N.Y. Jan. 18, 2002).

> giving the trustees a legal excuse for declaring the principal and interest of the mortgage to be due, and to give authority for a foreclosure. But ***this did not constitute collusion in the sense of the law***, . . .
> Collusion . . . ***implies the existence of fraud of some kind***, the employment of fraudulent means, or lawful means for the accomplishment of an unlawful purpose; but ***if the action be founded upon a just judgment, and be conducted according to the forms of law and with a due regard to the rights of parties, it is no defence that the plaintiff may have had some ulterior object*** in view beyond the recovery of a judgment, so long as such object was not an unlawful one.

Here also, Indu Craft ***had*** no defense to Trendi's claim, and was duty bound to concede, consistent with the dictates of Rule 11, Fed. R. Civ. P. See Ayers v. C&D Gen. Contrs., 269 F. Supp. 2d 911 (W.D. Ky. 2003) (consent judgment for $1 million on condition that it may be enforced only against insurance company, not against judgment debtor; not necessarily void). Thus, the fact that Indu Craft did not waste resources in fruitless litigation is irrelevant.

2. The Lower Court's Decisions' Conflict with the New York Court of Appeals' Decision In ***Duffy*** Should Be Reviewed by this Court

The Decisions conflict with the decision of New York's highest Court in Duffy v. Horton Memorial Hospital, 66 N.Y. 2d 473, 497 N.Y.S.2d 890 (N.Y. 1985), on the relation back of third party claims. Baroda disputes this because Duffy involved an amendment of an existing

pleading, rather than a separate pleading. This exalts form over substance, contrary to settled law, Mitchell v. Helms, 530 U.S. 793, 858 (2000); Robinson v. Glynn, 2003 U.S. App. LEXIS 23135, *22 (4th Cir. Nov. 13, 2003). Whether the document asserting a claim is called an amended complaint or a second complaint is irrelevant to the substance of the claim.

Unlike Rule 14, Fed. R. Civ. P., New York state procedure mandates that such claims be made only through an amendment, not a direct pleading. N.Y. C.P.L.R. §1009; Duffy, 497 N.Y.S.2d at 892. This procedural detail does not affect the limitations period governing the diversity claims. "The fact that under New York law a statute of limitations might be lengthened or shortened, . . . are all matters of local law properly to be respected by federal courts sitting in New York . . ." Guaranty Trust Co. v. York, 326 U.S. 99, 107 (1945). The Decisions here refused to do so, directly contradicting Duffy, 497 N.Y.S.2d 890.

Baroda also boldly asserts that it had "no notice that it would be subjected to claims by Trendi" until July 30, 2001, BR, 21, and that the lower courts had "implicitly" so found, which factual "finding" cannot be reviewed by this Court. This is frivolous:

> It is evident that ***when a third party has been served with the third-party complaint, and all prior pleadings in the action as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff's potential claim at that time.*** The third-party defendant must gather evidence and vigorously prepare a defense. There is no temporal repose.

Duffy, 497 N.Y.S.2d at 894. Thus, Baroda had "notice" as a matter of law. Moreover, Baroda does ***not*** (and cannot) claim that it was prejudiced by any alleged lack of notice.

Baroda's own unequivocal assertions in its 1990 memorandum seeking stay of this action demonstrate its awareness conclusively.[7] As the Second Circuit observed in its previous opinion herein, Baroda had "argued that both the fourth party action and the pending 1987 Action involved "virtually the same parties, . . . arise out of the

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[7]For example, Baroda repeatedly emphasized that Indu Craft and Trendi were but one and the same:

> It is irrelevant that Indu Craft sues directly in the 1987 action and alleges its claims against [Baroda] as indemnity causes of action in the instant action. . .
>
> ********** ********** **********
>
> [Baroda would be extremely prejudiced should it be forced to defend two actions arising from ***the same facts and circumstances and involving the same issues brought by the same plaintiff***.
>
> ********** ********** **********
>
> The third party and fourth party actions are merely a sham concocted by Mehta to attempt to avoid liability to BOI ***by passing Trendi's debts through his various corporations to [Baroda]***.

App. 21a-22a (Baroda's Memo in Support of Motion for Dismiss/strike/stay, of August 10, 1990) (emphasis added). See also, App. 17a (Baroda's Memo in Opposition to Indu Craft's Cross-motion to Sever and Consolidate) ("Indu Craft chose to allege its claims for Trendi's damages in a separate action commenced almost three years after the 1987 Action was commenced . . ."). The third party complaint, App. 1a, as well as the fourth party complaint, App. 6a-11a, themselves gave abundant notice to Baroda of the claims at bar.

same facts and circumstances, . . . [and] involve the same claims," and that Indu Craft would not be prejudiced by dismissing or staying the fourth party action pending resolution of the 1987 Action." Bank of India v. Trendi Sportswear, Inc., 239 F.3d 428, 433 (2nd Cir. 2000). Baroda knew that "Indu Craft ceased operations in November 1987," Indu Craft v. Bank of Baroda, 47 F.3d 490, 493 (2nd Cir. 1995) – 3 years before this proceeding.

3. The Variation of Limitations Period Governing Rule 14 Claims Is an Important Question of Federal Law Which Should Be Decided by this Court

The Decisions made the limitations period for direct claims under Rule 14 claim vary depending on how it was asserted. TP, 25-30. Baroda's ***only*** response[8] is that Trendi somehow "misunderst[ood]" underlying principles, BR, 23, thereby implicitly conceding the point.[9]

---

[8]Baroda also asserts that Trendi is not a "party" herein in view of the Bankruptcy Judgment, BR, 23 n.12, although the District Court never dismissed Trendi from this case or transferred the third party complaint to the Bankruptcy Court. Transfer of a claim requires a ***specific*** order. Sterling Consulting Corp. v. United States, 245 F.3d 1161, 1167 (10th Cir. 2001), cert denied, 534 U.S. 1114 (2002). Absent such a transfer, Trendi's third party complaint cannot be said to have "merged" in the Bankruptcy Judgment. Trendi continued to be a party here. It could have amended its third party complaint, and hence, can raise the viable issue of applicable limitations period.

[9]Baroda concedes that Section 524 (e) "is intended to benefit creditors," BR, 13, but nevertheless Baroda claims that "it was not Trendi, but Indu Craft that sought to rely upon" that provision. Id. In fact, Trendi did rely on that provision; to avoid repetition, Trendi has consistently adopted Indu Craft's arguments in the lower courts. Indu Craft was fulfilling its legal obligation under the plan to prosecute its claims herein in good faith.

CONCLUSION

The Petition should be granted with respect to the issues raised.

Dated: New York, New York
November 18, 2003

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CIVIL ACTION NO.
THIRD-PARTY COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintif,

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party Plaintiff,

-against-

INDU CRAFT, INC,
Third-Party Defendant,

Defendant and Third-Party Plainfiff Trendi Sportswear, Inc. ("Trendi"), by its attorneys, Crowell, Rouse & Matera, as and for its Third-Party Complaint herein, allegs as follows:

COUNT I

1. Plaintiff, Bank of India, has filed a complaint against Defendant, Trendi, a copy of which is hereto attached as Exhibit 1. Trendi interposed its answer thereto, a copy of which is annexed as Exhibit 2.

2. Trendi is a wholesaler and importer of garments, in particular, ladies ready made garments.

3. Third-Party Defendant Indu Craft, Inc. ("Indu Craft"), imports such garments from India and the Far East and was Trendi's major supplier over a period including 1984 through 1987.

4. Indu Craft contracted to supply Trendi with garments for 1987, which were due to be shipped to the United States.

5. Beginning on or about May, 1987, Indu Craft breached its contract to supply such goods, allegedly because it was unable to obtain letters of credit for the benefit of its overseas suppliers, and either failed to deliver goods to Tendi or delivered goods late.

6. Trendi sought an increased line of credit from plaintiff, Bank of India, so that it could import the goods itself in an effort to mitigate its damages.

7. Because of the delay caused by Indu Craft's breach, Trendi was unable to import garments it had ordered, rendering it unable to achieve its projected sales on its seasonal merchandise and, with respect to garments received late, in many instances had to sell the same at reduced and even distress prices.

8. Many of Trendi's customers cancelled their orders due to the delay in receiving the goods caused by Indu Craft's breach.

9. Trendi was damaged as a result of Indu Craft's breach, and consequently lacks financial means to fulfill its alleged obligations to plaintiff, Bank of India.

10. If Trendi is adjudged liable to plaintiff Bank of India in this action, it will have suffered damages, as a direct and proximate result of Indu Craft's breach of contract, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT II

11. Trendi repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 10, inclusive, hereof.

12. Indu Craft was aware of the nature of Trendi's business through the prior course of dealings and close relationship between the two companies.

13. Indu Craft knew that any delay in supplying goods to Trendi would cause Trendi to suffer lost profits.

14. The total cost of the goods which Trendi contracted to purchase from Indu Craft was $7,217,175.50.

15. The total estimated sales Trendi would have achieved for the goods, had Indu Craft supplied them on time, is $10,035,816.16.

16. As a direct and proximate result of Indu Craft's breach of contract, as aforesaid, Trendi has been damages in the amount of $2,818.640.66, representing its lost profits as nearly as now can be est imated.

COUNT III

17. Trendi repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 16 inclusive, hereof.

18. In the garment industry, goodwill and reputation are critical to the sucess of a business.

19. Indu Craft knew that its failure to deliver the goods to Trendi as promised would result to damage to Trendi's business reputation for reliability among its customers.

20. Trendi has been damaged as a direct and proximate result of Indu Craftf's breach in the amount of $2,300,000.00, as nearly as now can be estimated, representing loss of its business reputation and goodwill.

WHEREFORE, Trendi demands judgment against third-party defendant Indu Craft, Inc., with respect to Count I hereof, for all sums that may be adjudged against defendant Trendi in favor of plaintiff Bank of India; with respect to Count II hereof, for damages in the amount of $2,818,640.66, with respect to Count III hereof, for damages in the amount of $2,300,000.00, together with such further or different relief as the Court may deem just and proper.

Dated: New York, New York
May 14, 1990

CROWELL, ROUGE & MATERA
By: Francis R. Matern
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Trendi Sportswear, Inc.
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New York, New York 10016
212-732-3464

89 Civ. 5996 (SWK)
FOURTH-PARTY COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party, Plaintiff,

-against-

INDU CRAFT, INC.,
Third-Party Defendant and Fourth-Party Plaintiff,

-against-

BANK OF BARODA,
Fourth-Party Defendant.

Third-Party Defendant and Fourth-Party Plaintiff Indu Craft, Inc. ("Indu Craft") by its attorneys, Eaton & Van Winkle, as and for its Fourth-Party Complaint herein, alleges as follows:

COUNT I

1. Plaintiff, Bank of India, has filed a complaint against Defendant, Trendi Sportswear, Inc. ("Trendi"), a copy of which is annexed hereto as Exhibit 1. Trendi

interposed its answer thereto, a copy of which is annexed hereto as Exhibit 2.

2. Trendi has filed a Third-Party Complaint against Indu Craft, a copy of which is annexed herato as Exhibit 3. Indu Craft interposed its answer thereto, a copy of which is annexed hereto as Exhibit 4.

3. Third-Party Defendant Indu Craft imports ladies ready made garments from India and the Far East and was Trendi's major supplier over a period including 1984 through 1987.

4. Indu Craft contracted to supply Trendi with garments for 1987, which garments were due to be shipped to the United States, and Fourth-Party Defendant Bank of Baroda ("Baroda") knew of such ongoing supply contracts.

5. The seasonal nature of the garments ordered from Indu Craft by Trendi made time of the essence in connection with the contracts between Trendi and Indu Craft and Baroda knew or reasonably should have known that time was of the essence.

6. Beginning in or about May, 1987, Indu Craft became unable to supply such goods because Fourth-Party Defendant Baroda wrongfully, maliciously, without justification and/or in bad faith curtailed, limited, abridged and/or terminated certain credit privileges which Indu Craft had established over a period of years with Baroda and upon the continuation of which Indu Craft justifiably relied in placing orders with overseas manufacturers for goods ordered from

Indu Craft by Trendi and of which reliance Baroda had actual or constructive knowledge.

7. As a direct and proximate result of Baroda's actions, as aforementioned, Indu Craft was denied letters of credit for the benefit of its overseas suppliers by Baroda or such credit was materially delayed, and as a direct result Indu Craft either failed to deliver goods to Trendi or delivered goods late.

8. Trendi has claimed it was damaged as a result of Indu Craft's failure to deliver or to deliver timely the goods ordered by Trendi and has claimed that it consequently lacks financial means to fulfill its alleged obligations to plaintiff, Bank of India,

9. If Indu Craft is adjudged liable to third-party plaintiff Trendi in this action, it will have suffered damages, as a direct and proximate result of Baroda's tortious interference with contract, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT II

10. Indu Craft repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 9, inclusive, hereof.

11. Baroda and Indu Craft had a contract to establish and continue credit privileges for Indu Craft's commercial use, which contract Baroda breached by the aforementioned conduct.

12. If Indu Craft is adjudged liable to third-party plaintiff Trendi in this action, it will have suffered damages, as a direct and proximate result of Baroda's breach of its contract with lndu Craft, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT III

13. Indu Craft repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 12, inclusive, hereof.

14. Baroda was awareof the nature of Indu Craft's and Trendi's businesses and the close relationship between the two companies through its prior course of dealings with both lndu Craft and Trendi .

15. Baroda knew that any delay in providing credit to Indu Craft in the form of Letters of Credit in favor of overseas manufacturers would delay or prevent Indu Craft from supplying goods to Trendi and would thereby cause Trendi to suffer lost profits.

16. Trendi has claimed the total cost of the goods which Trendi contracted to purchase from Indu Craft was $7,217,175.50.

17. Trendi has claimed the total estimated sales Trendi would have achieved for the goods, had Indu Craft supplied them on time, was $10,035,816.16.

18. Trendi has claimed that as a direct and proximate result of Indu Craft's alleged breach of

contract, Trendi has been damaged in the amount of $2,818.640.66, representing its estimated lost profits.

19. If Indu Craft is adjudged liable to Trendi for its lost profits claimed in this action, as aforesaid, it will have suffered damages, as a direct and proximate result of Baroda's conduct, equal to the amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

COUNT IV

20. Indu Craft repeats and realleges as if fully set forth herein the allegations contained in paragraphs 1 through 19, inclusive, hereof.

21. In the garment industry, goodwill and reputation are critical to the success of a business.

22. Baroda knew that its interference with Indu Craft's credit facility in 1987, as aforesaid, would harm lndu Craft's ability to deliver the ordered goods to Trends and would result in damage to Trendi's business reputation for reliability among it customers.

23. Trendi has claimed it has been damaged as a direct and proximate result of Indu Craft's alleged breach of contract in the amount of $2,300,000.00, as nearly as now can be estimated, representing loss of its business reputation and goodwill.

24. If Indu Craft is adjudged liable to Trendi for its loss of business reputation and goodwill claimed in this action, it will have suffered damages, as a direct and proximate result of Baroda's conduct, equal to the

amount of such judgment, which damages it hereby claims, together with interest, its costs, expenses and attorneys' fees.

WHEREFORE, fourth-party plaintiff, Indu Craft, Inc., demands judgment against fourth-party defendant Bank of Baroda with respect to Counts I, II, III and IV hereof, for all sums that may be adjudged against it as third-party defendant Indu Craft in favor of third-party plaintiff Trendi Sportswear, Inc., together with interest, its costs, expenses and attorneys' fees and such further or different relief as the Court may deem just and proper.

Dated: New York, New York
June 21, 1990

EATON & VAN WINKLE
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Chapter 11
Case No. 97 B 44958 (JHG)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
In re
INDU CRAFT, INC.
Taxpayer I.D. No. 13-3048561,
Debtor.

DISCLOSURE STATEMENT FOR PLAN OF REORGANIZATION OF INDU CRAFT, INC.

THIS IS NOT A SOLICITATION OF ACCEPTANCES OR REJECTIONS OF THE PLAN. ACCEPTANCES OR REJECTIONS MAY NOT BE SOLICITED UNTIL A DISCLOSURE STATEMENT HAS BEEN APPROVED BY THE BANKRUPTCY COURT. THIS DISCLOSE STATEMENT IS BEING SUBMITTED FOR APPROVAL, BUT HAS NOT BEEN APROVED BY THE BANKRUPTCY COURT.

ROBINSON BROG LEINWAND GREENE GENEVESE & GLUCK P.C.
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1345 Avenue of the Americas
New York, New York 19105-0143
(212) 586-4050

Of Counsel: A. Mitchell Greene, Esq.
Michael S. Schreiber, Esq.

Dated: New York, New York
November 20, 1997

Additionally, on June 21, 1990, the Debtor filed a fouth-party complainst against Bank of Baroda ("Baroda II") claiming that any damages that it was required to pay to Trendi were proximately caused by Bank or Baroda's bad faith actions and that Bank of Baroda should be required to pay the Debtor any sums that the Debtor was required to pay to Trendi.

On or about August 13, 1990, Bank of Baroda filed a motion in Baroda II seeking the entry of an order pursuant to Rule 12(b) and 14(a) of the Federal Rules of Civil Procedure dismissing the fourth-party complaint or staying Baroda II from proceeding until the Baroda Action was resolved by the entry of a final judgment, alternatively, Bank of Baroda sought an order dismissing the fourth-party complaint for failing to meet technical requirements governing impleader actions. In short, Bank of Baroda sought a stay of proceedings in Baroda II because it alleged the causes of action alleged in Baroda II were based upon the same facts and circumstances alleged in the Baroda Action and Baroda II was nothing more than a repetition of the Baroda Action.

In response thereto, on September 18, 1990, the Debtor filed a cross-motion seeking the entry of an order pursuant to Rule 42 of the Federal Rules of Civil Procedure severing Baroda II from the Trendi Action and consolidating Baroda II with the Baroda Action. In particular, the affidavits submitted in support of the Debtor's cross-motion noted that although the claims for liability raised in Baroda II were essentially identical with those raised in the Baroda Action, the damages claimed in Baroda II were entirely distinct. As set forth therein, the damages incured by Trendi for

which claims had been asserted by Trendi against the Debtor and by the Debtor against the Bank of Baroda, had not been included in the statement of damages provided in the Baroda Action.

After a hearing held on October 5, 1990, the District Court ordered that the proceedings in Baroda II be stayed pending a resolution of the Baroda Action. That stay has never been lifted.

The jury in the Baroda Action specifically found that in Marh 1987 the Debtor had existing, valid contracts with Trendi and that Bank of Baroda and Chokshi were aware of the existence of such contracts. The Debtor was not permitted to submit evidence in the Baroda Action with respect to the damages asserted in Baroda II.

The Debtor believes that the judgment in the Baroda Action will collaterally estop Bank of Baroda from denying liability in Baroda II and all that remains to be litigated is the amount of damages. Accordingly, the Debtor is considering whether and how to obtain a modification of the stay in Baroda II so that these issues can be litigated. Additionally, the Debtor may seek to amend its fourth-party complaint in Baroda II to state a cause of action against Bank of Baroda for treble damages under the Racketeer Influenced and Corruption Organization ("RICO") statutes.

The IRS, the City and the State. The Debtor is a "C" corporation fiing tax returns on a calendar year basis. For the year ending December 31, 1985, the Debtor had taxable income of $729,153 and owed federal income taxes of $314,420. Although a Form 1120 tax return

was filed with the IRS, the taxes for this period were not paid and remain outstanding. The IRS has asserted

Copies of all pleadings, orders, lists, schedules, proofs of claims or other documents submitted in these cases are on file in the Office of the Clerk of the United States Bankruptcy Court at Alexander Hamilton Custom House, One Bowling Green, New York, New York, 10004, and are available for public inspection Monday through Friday, between the hours of 9:30 a.m. and 12:00 noon and 1:30 p.m. and 4:30 p.m.

CONCLUSION

The Debtor believes the Plan is in the best interests of all Creditors and Interest Holders and strongly encourages all holders of Claims against and Interests in the Debtor to vote to accept the Plan and to evidence such acceptances by promptly returning their Ballots to ensure that they will be received not later that 5:00 p.m., Eastern Standard Time, on _____, 1998.

Dated:New York, New York
November 29, 1997

INDU CRAFT, INC.
By: Hemant Mehta, its President

ROBINSON BROG LEINWAND GREENE GENEVESE & GLUCK P.C.
By: Michael S. Schreiber, Esq. (MSS-5398)
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89 Civ. 5996 (JSM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party, Plaintiff,

-against-

INDU CRAFT, INC.,
Third-Party Defendant and Fourth-Party Plaintiff,

-against-

BANK OF BARODA,
Fourth-Party Defendant.

BANK OF BARODA'S MEMORANDUM IN OPPOSITION TO INDU CRAFT'S CROSS-MOTION TO SEVER AND CONSOLIDATE AND IN FURTHER SUPPORT OF BANK OF BARODA'S MOTTON TO DISMISS OR STAY THE FOURTH-PARTY ACTTON, OR STRIKE THE FOURTH-PARTY COMPLAINT

Constance M. Boland
Catherine A. Diviney
Of Counsel

September 8, 1989, when BOI commenced the instant action, Boland Sept. Aff. ¶ 4, Indu Craft failed to assert that claim in the 1987 Action. Instead, it chose to allege its claims for Trendi's damages in a separate action commenced almost three years after the 1987 Action was commenced and after its complaint in that action was dismissed. Now, Indu Craft cannot attempt to delay the entry of judgment against it in the 1987 Action by seeking consolidation of its fourth-party claim. Indu Craft, in effect, turns judicial economy on its head.

(3) Consolidation Will Result In Significant Delay, Confusion and Prejudice to the Bank

In its motion papers, Indu Craft claims that consolidation will avert delay, confusion or prejudice. Cross-Motion Mem. at 6-8. As, even Indu Craft admits, id. at 8, this is wrong.

First, consolidation would cause delay. Id. Although Indu Craft focuses on the numerous similarities between the two actions in concluding that consolidation would cause no delay, it ignores the different damages claims in the two actions that it emphasizes so strongly in arguing against the Bank's motion to dismiss or stay. Id. at 7-8 and Opp. Mem at 2. It Indu Craft attempts to produce evidence of Trendi's damages in the 1987 Action, then a significant amount of discovery, including depositions and document production, must be completed before

Indu Craft, however, would not be prejudiced by the denial of consolidation. Should this Court strike the fourth-party complaint, Indu Craft may be able to bring a separate claim against the Bank if, and when, Trendi enters judgment against Indu Craft. If this Court stays the fourth-party action until judgment is entered in the 1987 Action, Indu Craft's claim for Trendi's damages would survive and any applicable rulings made in the 1987 Action would, govern the fourth-party action. Should this Court dismiss Indu Craft's fourth-party complaint, Indu Craft may not necessarily be precluded from recovering Trendi's damages in the 1987 Action.

In its motion papers, Indu Craft emphasizes that the Bank secured a "technical summary judgment" against it. Cross-Motion Mem. at 6, 7 and 8. Although there is no such term in the Federal Rules, Indu Craft apparently employs the adjective "'technical"' to imply that the Bank prevailed on its motion for partial summary judgment due to some technicality.[5] Nothing could be further from the truth. As

[5] Indu Craft magnanimously states that it "is willing to abide by a decision rendered in the Indu Craft action." Cross-Motion Mem. at 7. The purpose of this statement is unclear since it is obvious that non-compliance with an order of this Court would subject Indu Craft to contempt.

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89 Civ. 5996 (JSM)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BANK OF INDIA,
Plaintiff,

-against-

TRENDI SPORTSWEAR, INC.,
Defendant and Third-Party, Plaintiff,

-against-

INDU CRAFT, INC.,
Third-Party Defendant and Fourth-Party Plaintiff,

-against-

BANK OF BARODA,
Fourth-Party Defendant.

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS OR STAY THE FOURTH-PARTY ACTION OR, IN THE ALTERNATIVE, TO STRIKE THE FOUTHT-PARY COMPLAINT

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¶¶ 25, 26-27, and 33-34. In the fourth-party complaint in the instant action, Indu raft summarizes its Amended Verified Complaint in the 1987 Action by alleging that

in or about May 1987 . . . Fourty-Party Defendant Baroda . . . limited, abridged and/or terminated certain credit privileges which Indu Craft had established over a period of years with Baroda . . .

Boland Aff. Ex. B ¶ 6. It is clear that in this summary in the fourth-party complaint, Indu Craft is referring to the same actions of the Bank described in more detail in the Amended Verfied Complaint in the 1987 Action.

Further, both actions involve the same claims. In the 1987 Action, Indu Craft sues for breach of the implied covenant of good faith and fair dealing, tortious interference with contract and prima facie tort. Boland Aff. ¶¶ 9-11. In the fourth-party complaint in the instant action, lndu Craft asserts that if

Indu Craft is adjudged liable to third-party plaintiff Trendi in this action, it will have suffered damages as a direct and proximate result of Baroda's tortious interference with contract . . . . Baroda's breach of its contract with Indu Craft . . . [and] Baroda's conduct . . .

Boland Aff. Ex. F ¶¶ 9, 12, 19 @ 24

It is irrelevant that Indu Craft sues directly in the 1987 Action and alleges its claims against the Bank as indemnity causes of action in the instant action. The gravamen

Fourth, due to the pending motions and the extensive discovery already completed in the 1987 Action, there is a greater likelihood of a prompt result in the 1987 Action. Fifth, the parties, counsel and witnesses would be significantly prejudiced and inconvenienced if they were forced to participate in additional and duplicative discovery and motion practice in the fourth-party action, when such discovery and motion practice has previously been conducted in the 1987 Action. Sixth, the Bank would be extremely prejudiced should it be forced to defend two actions arising from the same facts and circumstances and involving the sane issues brought by the same plaintiff. The Bank has already defended itself in the 1987 Action; Indu Craft should not be afforded a second bite of the apple in this fourth-party action.

Finally, it should be emphasized that this alleged fourth-party action is merely a procedural ploy used to revive Indu Craft's action against the Bank, which has already been dismissed twice by this Court. Trendi and Indu Craft are both solely owned by Hemant C. Mehta ("Mehta"). Mehta completely controls Trendi and Indu Craft. During the relevant time period, Trendi was Indu Craft's only customer, Boland Aff. ¶10. The, primary action is BOI's action on the credit facility with its former customer, Trendi. That claim is completely unrelated to the purported claims brought by Trendi and Indu Craft. The third-party and fourth-party actions are merely a sham concocted by Mehta to attempt to avoid liability to BOI by passing Trendi's debts through his various corporations to another bank. This Court should not tolerate such an abuse of the procedural mechanisms offered by the Federal Rules.

Indu Craft's fourth-party complaint should be dismissed.

POINT II

THE FOURTH PARTY COMPLAINT IS NOT A PROPER IMPLEADER COMPLAINT UNDER RULE 14 AND IT SHOULD BE STRIKEN

Rule 14(a) of the Federal Rules of Civil procedure provides that:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff . . . Any party may move to strike the third-party, claim . . . .

Fed. R. Civ. P. 14(a). Rule 14 was "designed to eliminate multiple and repetitive lawsuits and trials by allowing for a single presentation of evidence when multiple clamis turn upon identical or similar proof." National Bank of Canada v. Artex Indus, Inc., 627 F. Supp. 610, 613 (S.D.N.Y. 1986) (quoting Sirota v. Solitron Devices, Inc., 97 F.R.D. 732, 736 (S.D.N.Y. 1983)).

pending action or, in the alternative, to strike the fourth-party complaint for failing to meet the requirements of Rule 14(a).

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